

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DAUYNE M. ANDREWS,

Defendant-Appellant.

UNPUBLISHED

June 17, 2003

No. 237022

Wayne Circuit Court

LC No. 00-010928

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of negligent operation of a vehicle causing homicide (negligent homicide), MCL 750.324, two counts of operating a vehicle without a license causing death (OMVCD), MCL 257.904(4), and one count of first-degree fleeing and eluding, MCL 257.602a(5). He was sentenced, as a second habitual offender, MCL 769.10, to 1½ to 3 years' imprisonment for each of the negligent homicide convictions, 125 to 270 months' imprisonment for each of the OMVCD convictions, and 125 to 270 months' imprisonment for the first-degree fleeing and eluding conviction, the sentences to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first argues that his convictions for OMVCD and negligent homicide constitute multiple punishment of the same offense. We disagree. Defendant did not raise this issue below. To avoid forfeiture of this unpreserved constitutional issue on appeal, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If plain error affecting substantial rights is established, this Court must then "exercise its discretion in deciding whether to reverse." *Id.* We reverse only where the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Under both the United States and the Michigan Constitutions, a defendant shall not be placed twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000).

The Legislature's intent is the determining factor in concluding whether there had been a Double Jeopardy Clause violation of the federal and state constitutions. An alleged violation of this constitutional guarantee is measured by the standards set forth in *People v Denio*, 454 Mich 691, 707-708; 564 NW2d 13 (1997):

The United State Supreme Court has repeatedly held that the test enumerated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is to be used to determine legislative intent in analyzing the protection afforded by the Double Jeopardy Clause of the United States Constitution:

“For over half a century we have determined whether a defendant has been punished twice for the ‘same offense’ by applying the rules set forth in *Blockburger v United States*, 284 US 299, 304; 53 S Ct 180; 76 L Ed 306 (1932). If ‘the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.’ *Ibid*. In subsequent applications of the test, we have often concluded that two different statutes define the ‘same offense,’ typically because one is a lesser included offense of the other. [*Rutledge v United States*, 517 US 292, ____; 116 S Ct 1241; 134 L Ed 2d 419, 426 (1996).]”

* * *

This Court has rejected the *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution, and instead uses traditional means to determine the intent of the Legislature, such as the subject, language, and history of the statutes. [*People v Kulpinski*, 243 Mich App 8, 13; 620 Nw2d 537 (2000). quoting *Denio*, *supra*.]

In the instant case, defendant was convicted of OMVCD and negligent homicide. The OMVCD statute, MCL 257.904(4), provides:

A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both. This subsection does not apply to a person whose operator's or chauffeur's license was suspended because that person failed to answer a citation or comply with an order or judgment pursuant to section 321a.

Further, subsection (1) provides:

(1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor

vehicles, including an area designated for the parking of motor vehicles, within this state.

The negligent homicide statute, MCL 750.324, provides:

Any person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$2,000.00, or by both such fine and imprisonment.

Both OMVCD and negligent homicide have in common the (1) operation a motor vehicle, and (2) causing the death of another. However, the negligent homicide statute also contains the element of operation of a motor vehicle at an “immoderate rate of speed or in a careless, reckless or negligent manner,” while the OMVCD statute requires proof that the defendant has a suspended or revoked license. Thus, each offense requires proof of at least one fact which the other offense does not.

Additionally, the plain language of the OMVCD statute focuses on a culpable act of driving with a suspended or revoked license, and not on the unavoidable killing of another. The culpable act that the Legislature intended to prevent is the one in which a person without a license decides to drive. Thus, causing the death of another increases the punishment of having driven without a license. *Kulpinski, supra* at 16-20. On the other hand, the causation of the death of another human being is the violation of a societal norm sought to be prohibited by the Legislature in enacting the negligent homicide statute. *People v Herron*, 464 Mich 593, 607: 628 NW2d 528 (2001). While the negligent homicide statute prohibits the causation of the death of another human being, the OMVCD statute addresses the culpable act of deciding to drive without a license. Thus, the respective statutes prohibit conduct violative of distinct social norms.

The Legislature also manifested its intent to serve two different interests by separately punishing each of these offenses when it created a large disparity in the punishments authorized by the statutes. *People v Ayers*, 213 Mich App 708, 718-719; 540 NW2d 791 (1995). OMVCD is “punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both.” MCL 257.904(4). However, a conviction for negligent homicide is only “punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than \$2,000.00, or by both such fine and imprisonment.” MCL 750.324. Further, OMVCD is a felony, and a negligent homicide is a misdemeanor. Thus, the disparate punishments provided for under each statute suggest the Legislature intended multiple punishments for violations of these criminal statutes. *Ayers, supra* at 718-719.

In addition, the statutes are not hierarchical or cumulative. Generally, the language of a statute may indicate a legislative intent to create a series of offenses prohibiting different phases of conduct, with a separate penalty for each. *Crawford, supra* at 349. However, legislative intent may sometimes appear from language creating a hierarchy of offenses, depending on the presence or observance of certain aggravating factors. *Id.* Here, the statutes prohibit different phases of conduct, with a separate penalty for each. First, the OMVCD statute is found in the

motor vehicle code, while negligent homicide is within the penal code. Second, the statutes also prohibit different phases of conduct in that the OMVCD statute addresses the culpable act of driving without a license, while the negligent homicide statute prohibits the causation of the death of another human being.

The statutes prohibit conduct that violates distinct social norms and can be viewed as separate and as permitting multiple punishments. Therefore, since “the statutes at issue in this case are sufficiently distinct in purpose to permit separate and multiple punishment,” *People v Robideau*, 419 Mich 458, 487; 355 NW2d 592 (1984), there was no violation of double jeopardy under the United States and Michigan Constitutions.

Defendant next argues that he was denied effective assistance of counsel. We disagree. Since defendant did not move for an evidentiary hearing or motion for new trial before the trial court, this Court will consider defense counsel’s mistakes only to the extent they are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Defendant must show, with regard to counsel’s performance, “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*

Defendant argues that defense counsel was ineffective in failing to investigate potentially exculpatory witnesses. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

Defendant has failed to prove that defense counsel performed deficiently. The record revealed the two individuals’ names were Tim and Chris. Defendant testified that they picked him up from his home on the night in question. Defendant alleged that Chris was the driver of the van that struck the car killing two people. However, defendant could not provide information concerning Chris’ or Tim’s whereabouts. Defendant did offer to take the police to Chris’ home, but there is no indication in the record that defense counsel did not attempt to locate Chris at his address. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Here, defendant has not met this burden.

Moreover, the existing record is sufficient to determine that counsel’s performance, relative to the presentation of defendant’s theory that someone else was the driver of the van, did not fall below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defense counsel presented evidence and argued that defendant was not the driver of the van. The police statement of a missing witness, which indicated that three men exited the van after the accident, was argued to the jury to establish that defendant was not the

driver of the van. Therefore, because defendant was not deprived of asserting his defense that he was not the driver of the van, he was not denied effective assistance of counsel. *Hyland, supra* at 710.

Defendant next argues that the trial court abused its discretion in admitting a photograph depicting the body of a victim, Sean Daubney, in a severely burned condition. We agree that trial court abused its discretion in admitting the photograph, but find that reversal is not required in this case. The admission of evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

In general, “[p]hotographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence.” [*People v Mills*, 450 Mich 61, 76-77; 537 NW2d 909 (1995), quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972), in turn quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861.]

After defendant objected to the admission of the photograph, the prosecution offered no purpose for admitting the photograph into evidence and the trial court admitted the photograph determining only that it was more probative than prejudicial. On appeal, the prosecution suggests that the photograph was admitted because “[i]t certainly explained how the car looked after it burned and underscored the severity of the crash caused by defendant’s action.” After reviewing the record, it appears the photograph was offered to further establish Daubney’s identity and to establish that the autopsy was performed on the body found inside the burned car. The photograph does not appear to be substantially necessary or instructive in showing material facts or conditions. Therefore, the relevance of the photograph, if any, is marginal.

Moreover, the probative value of the photograph is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). The photograph graphically depicts Daubney’s body, which had been severely burned. The photograph was cumulative to testimony that the car was fully engulfed in flames and that Daubney’s body burned inside the vehicle. Such a photograph is merely “calculated to arouse the sympathies or prejudices of the jury.” *Mills, supra*, 450 Mich 76-77. Therefore, the trial court abused its discretion in admitting the photograph of Daubney’s burned body where there was no legitimate purpose for the admission of the photograph, and because of the prejudicial affect of the photograph.

In Michigan, the harmless-error rule is primarily embodied in statute MCL 769.26, which provides, in pertinent part:

No judgment or verdict shall be . . . reversed . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute controls judicial review of preserved, nonconstitutional error. *People v Lukity*, 460 Mich 484, 495; 496 NW2d 497 (1999). The burden is on the defendant to demonstrate that "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *Id.* Reversal is only required if such an error is prejudicial and that the appropriate inquiry "focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence." *Id.*, citing *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). A preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. *Id.* at 495-496.

Defendant has not demonstrated that the admission of the photograph was outcome determinative, and reversal is not required. There was limited reference to the photograph by the prosecution and there was other competent testimony given at trial describing Daubney's burned body. In particular, the assistant medical examiner testified that there was fourth-degree burns, or charring, covering Daubney's entire front and back with some sparing of the left groin and right side. Further, that Daubney's right arm was exposed and a "right chest wall split apart secondary to the burns." This testimony regarding Daubney's cause of death adequately describes the contents of the photograph. Moreover,

It may be presumed that today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing the scene of a crime or the body of a victim in the condition or the place in which found. [*Mills, supra*, 450 Mich 77 n 11.]

Given that other competent evidence mitigated the prejudicial affect of the erroneous admission of the photograph, it does not affirmatively appear that it is more probable than not that the error was outcome determinative, and defendant is not entitled to reversal.

Defendant next argues that the prosecution's closing argument shifted the burden of proof to defendant because the argument required defendant to prove his innocence. Since defendant failed to timely and specifically object, this Court will review for a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96, (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

The relevant portion of the prosecutor's closing argument is as follows:

The defendant wants you to believe that a ghost was driving that car. That people who knew him so well, who came to pick him up from his mother's house, he doesn't know there [sic] their last name, let alone where they actually live. He was out /months, although he is facing murder charges, didn't think it important enough to get an address, call the police up and say this is where he lives, because no such person exists.

The prosecution's argument did not shift the burden of proof to the defense.

[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Reid, supra*, 233 Mich App 478, citing *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).]

Defendant testified that there was someone else driving the van that struck the car killing two people. This testimony advanced a theory that defendant was not the principal criminal agent. After asserting this theory, the prosecution merely commented on the validity of defendant's theory, which cannot be said to shift the burden of proving innocence to defendant. *Reid, supra*, 233 Mich App 478. The prosecution may also contest evidence presented by the defendant. *Id.* at 477. The prosecution argument called into question defendant's credibility because the jury would have to believe defendant testimony to acquit him of the charges. Moreover, the trial court instructed the jury that "the defendant is not required to prove innocence or do anything," and "the prosecution must prove each element of the crime beyond a reasonable doubt." Therefore, defendant has not established a plain error affecting substantial rights and this issue is accordingly forfeited. *Carines, supra*, 460 Mich 761-762.

Defendant last argues that his sentences are disproportionate. Since defendant committed these offenses on February 26, 2000, the legislative sentencing guidelines apply to all of his sentences, except the OMVCD sentences, which were not included within the legislative sentencing guidelines when the offenses were committed. MCL 769.34(2). MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing, absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant was sentenced, as a second habitual offender, to 1½ to 3 years for the two negligent homicide convictions, 125 to 270 months for the first-degree fleeing and eluding conviction, and 125 to 270 months for each of the OMVCD convictions, the sentences to be served concurrently. Defendant's sentencing guidelines range for the two negligent homicide convictions were two to twenty-one months' imprisonment. Defendant's sentencing guidelines range for his conviction for one count of first-degree fleeing and eluding was 50 to 125 months'

imprisonment. Because defendant's offenses were committed before the OMVCD statute was added to the legislative sentencing guidelines, defendant was not given a sentencing guidelines range for those convictions.

With regard to defendant's first-degree fleeing and eluding sentence, defendant's guidelines range was 50 to 125 months. He was sentenced to 125 to 270 months' imprisonment. Defendant's minimum sentence was within the statutory guidelines range, albeit at the highest end. Likewise, defendant's guidelines range for each negligent homicide offense was two to twenty-one months' imprisonment, and defendant's minimum sentences of 1½ years' imprisonment are within the guidelines range. Under MCL 769.34(10), the Legislature intended to preclude appellate scrutiny of sentences falling within the guidelines absent scoring errors or reliance on inaccurate information. *People v Babcock*, 244 Mich App 64, 73; 624 NW2d 479 (2000). Here, defendant has not alleged scoring errors or reliance on inaccurate information. Therefore, since defendant's sentences fall within the statutory guidelines range, this Court may not consider defendant's challenge to those sentences.

Furthermore, defendant's OMVCD convictions are proportionate to the offense. A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). "[T]he 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended [guidelines] range, but whether it reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Defendant was driving a stolen van and attempted to flee police. The police initially pursued defendant, but later testified they were told to terminate the chase because it was no longer safe. Shortly after the police had stopped pursuit, defendant recklessly drove through a busy intersection and collided into the side of a car. The collision caused the car to ignite on fire. Because of defendant's actions, two people died. One person died inside the car, and the other managed to escape the burning car before dying on a nearby porch. This case presents serious offenses that resulted in two deaths. *Milbourn, supra*, 435 Mich 654. Therefore, the trial court acted within its authority in sentencing defendant to 125 to 270 months' imprisonment for the OMVCD convictions.

Defendant's OMVCD sentence is proportionate to the offense, and defendant's remaining minimum sentences are within the legislative guidelines and cannot be reviewed.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood